

McNAIR & SANFORD, P.A.

ATTORNEYS AND COUNSELORS AT LAW

MADISON OFFICE BUILDING/SUITE 400
1155 FIFTEENTH STREET, NORTHWEST
WASHINGTON, DC 20005

TELEPHONE 202/659-3900
FACSIMILE 202/659-5763

CHARLESTON OFFICE
140 EAST BAY STREET
POST OFFICE BOX 1431
CHARLESTON, SC 29402
TELEPHONE 803/723-7831
FACSIMILE 803/722-3227

COLUMBIA OFFICE
NATIONS BANK TOWER
1301 GERVAIS STREET
POST OFFICE BOX 11390
COLUMBIA, SC 29211
TELEPHONE 803/799-9800
FACSIMILE 803/799-9804

GEORGETOWN OFFICE
121 SCREVEN STREET
POST OFFICE DRAWER 418
GEORGETOWN, SC 29442
TELEPHONE 803/546-6102
FACSIMILE 803/546-0096

GREENVILLE OFFICE
NATIONS BANK PLAZA
SUITE 601
7 NORTH LAURENS STREET
GREENVILLE, SC 29601
TELEPHONE 803/271-4940
FACSIMILE 803/271-4015

RALEIGH OFFICE
RALEIGH FEDERAL BUILDING
ONE EXCHANGE PLAZA
SUITE 810
POST OFFICE BOX 2447
RALEIGH, NC 27602
TELEPHONE 919/890-4190
FACSIMILE 919/890-4180

SPARTANBURG OFFICE
SPARTAN CENTRE/SUITE 306
101 WEST ST. JOHN STREET
POST OFFICE BOX 5137
SPARTANBURG, SC 29304
TELEPHONE 803/542-1300
FACSIMILE 803/542-0705

UNRECORDED

June 6, 1994

RECEIVED

JUN 6 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its "Motion to Dismiss the Application of Shellee F. Davis."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:


Stephen T. Yelverton

Enclosure

B:CATON.142

No. of Copies rec'd
List ABCDE

02H

RECEIVED

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 6 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction
Permit for a New FM Station,
Channel 280A, Westerville,
Ohio

MM Docket No. 93-107

File Nos. BPH-911230MA

through

BPH-911231MB

To: The Review Board

MOTION TO DISMISS THE APPLICATION OF SHELLEE F. DAVIS

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: _____

Stephen T. Yelverton
Attorneys for Ohio Radio
Associates, Inc.
1155 15th Street, N.W., Suite 400
Washington, D.C. 20005
Telephone: (202) 659-3900

June 6, 1994

B:CATON.142

MOTION TO DISMISS THE APPLICATION OF SHELLEE F. DAVIS

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, hereby submits this motion to dismiss the application of Shellee F. Davis ("Davis"). Dismissal is required because she does not have a proposed tower site and because she has failed to diligently prosecute her application by not obtaining a new site.

ORA requests leave to file this motion. Although the Commission has stayed or frozen the integration aspect of comparative hearings, the basic qualifying and non-integration aspects appear to remain unaffected. See, FCC Public Notice, FCC 94-41, released February 25, 1994. Because this motion raises certain basic qualifying and non-integration matters, it is appropriate. In support of its motion to dismiss, ORA offers the following comments.

In an amendment filed on March 28, 1994, Davis reported that her proposed tower site had been sold by Mid-Ohio Communications, Inc. to Spirit Communications, Inc. Although Davis never disclosed when the site was sold, she was given written confirmation of the sale by Mid-Ohio on March 2, 1994.

Davis further claimed that she had received "reasonable assurance" of the availability of the tower site from the new owner. However, in a pleading, dated May 3, 1994, Davis reported that the new owner had changed his mind. Davis was aware of the unavailability of the tower site from the new owner at least by April 13, 1994. Davis represented in her May 3, 1994, pleading that she was in the process of securing permission for a new site and promised to file an amendment. David A. Ringer, another applicant in this proceeding who also had initially specified the now unavailable Mid-Ohio tower site, filed amendment on May 9, 1994, specifying a new tower site. Davis so far has failed to file an amendment specifying a new tower site.

Accordingly, the application of Davis must be dismissed with prejudice for failure to prosecute. She does not have a tower site and has not been diligent in specifying a new site. Davis has known for over six weeks (since April 13, 1994) that her specified tower site is unavailable. It has been over one month since Davis promised to file an amendment to specify a new site. It has been almost a month since Ringer, another applicant in this proceeding who is in the

same situation as Davis, filed an amendment specifying a new site. Inexplicably, Davis has not been heard from.

Commission policy requires that Davis act with "due diligence" in obtaining "reasonable assurance" for a new tower site. See, National Communications Industries, 6 FCC Rcd 1978, para. 4 (Rev. Bd. 1991); Marlin Broadcasting of Central Florida, Inc., 5 FCC Rcd 5751, 5753, n. 9 (1990); Brownfield Broadcasting Corp., 88 FCC2d 1054, 1058 (1982). See also, Section 73.3522(b); Erwin O'Connor Broadcasting Co., 22 FCC2d 142, 143 (Rev. Bd. 1970).

An applicant without a tower site is ineligible for grant and must be dismissed from the proceeding forthwith. See generally, Marc A. Albert, 6 FCC Rcd 13, 14-15, para. 6 (Rev. Bd. 1991), citing Local Morgan Hill Radio Association, 4 FCC Rcd 2404 (Rev. Bd. 1989), rev. denied, 5 FCC Rcd 498 (1990), summary dismissal is appropriate where a basic qualifying matter is not met; Chudy Broadcasting Corp., 58 RR2d 133 (1988), temporizing with flawed application proposals does not serve the public interest.

WHEREFORE, in view of the foregoing, Davis must be dismissed with prejudice because she does not have a proposed tower site and because she has failed to diligently prosecute her application by not obtaining a new site.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By: 

Stephen F. Melverson
Attorneys for Ohio Radio
Associates, Inc.
1155 15th St., N.W.
Suite 400
Washington, D.C. 20005
Tel. 202-659-3900

June 6, 1994

020979.00001

ORA.614

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 6th day of June, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Motion to Dismiss the Application of Shellee F. Davis" to the following:

Joseph A. Marino, Chairman*
Review Board
Federal Communications Commission
Room 211
2000 L Street, N.W.
Washington, D.C. 20554

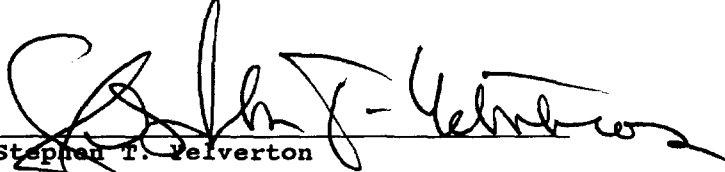
James Shook, Esquire
Hearing Branch
Federal Communications Commission
Room 7212
2025 M Street, N.W.
Washington, D.C. 20554

Arthur V. Belenduik, Esquire
Smithwick & Belenduik, P.C.
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036
Counsel for David A. Ringer

James A. Koerner, Esquire
Baraff, Koerner, Olender & Hochberg, P.C.
5335 Wisconsin Avenue, N.W.
Suite 300
Washington, D.C. 20015-2003
Counsel for ASF Broadcasting Corp.

Eric S. Kravetz, Esquire
Brown, Finn & Nietert, Chartered
1920 N Street, N.W.
Suite 660
Washington, D.C. 20036
Counsel for Wilburn Industries, Inc.

Dan J. Alpert, Esquire
Law Office of Dan J. Alpert
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Shellee F. Davis


Stephen T. Yelverton

*Hand Delivery